No. 82-6466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUIS RUIZ, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY MEMORANDUM

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In its opposing brief, the State of Illinois incorrectly claims that the court below did not decide the question of whether death may be imposed in the absence of a finding of intent to kill. (Resp. Br. at 4) The Illinois Supreme Court obviously did decide this question by upholding the death sentence imposed on petitioner.

The State erroneously asserts that a finding of intent was made by the sentencing judge (Resp. Br. at 7). The record shows that the judge found only that petitioner stood convicted of more than one murder. The judge acknowledged that he did not even know the "exact language" of the pertinent statute and did not have it before him. (R. 627-628, Pet.

Br. at 6) Nowhere does the Illinois Supreme Court make any mention of a finding of intent by the sentencing judge.

The only finding of intent in this case was made, by inference, by the Illinois Supreme Court on review. This method of affirming a sentence of death violated not only the Eighth Amendment but due process as well. Presnell v. Georgia, 429 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235 (1978).

The State falsely asserts that the constitutional question of non-statutory aggravation was not raised in the court below. (Resp. Br. at 4 and 8) In fact, the constitutionality of this provision of Illinois law was specifically challenged in a reply brief filed in the Illinois Supreme Court by petitioner's appellate counsel. (App. pg. 4) The State has chosen to omit this short document from the 100 pages of state court pleadings attached to its brief.

Luis Ruiz attacked the constitutionality of the proceedings employed to obtain a sentence of death as well as the sentence itself in the highest court of Illinois. This Court should grant certiorari to review that court's refusal to grant him relief.

Respectfully submitted,

Theodore A Gottfried

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State Appellate Defender

COUNSEL FOR PETITIONER

May 17, 1983

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NO. 53415

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

LUIS RUIZ,

Defendant-Appellant

Appeal from the Circuit Court of Cook County,
Criminal Division from a Sentence of Death

NO. 79 I 1986
Hon. James M. Bailey
Judge Presiding

* * * * *

APPELLANT'S REPLY BRIEF

* * * * *

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NO. 53415

IN THE
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PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

-vs-

LUIS RUIZ,

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Appeal from the Circuit Court of Cook County,
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* * * * * *

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendant's initial brief raised four main issues, two concerning the death penalty, one regarding a procedural ruling relative to the severance granted this defendant from the trial of Juan Caballero and one addressed to the reason-

able doubt of defendant's guilt. The latter two issues are deemed by defendant to have been suitably submitted in the opening brief. This brief is therefore devoted solely to the efficacy of the death penalty.

While the two arguments advanced previously were submitted under the general headings of legislative intent and constitutionality, other issues mandating a reversal of the death penalty were raised within the body of those contentions.

Principal among these was that the Court had considered as a factor in aggravation a previous confession to a murder made by the defendant to a crime for which he was never convicted (D. Br. p. 60-61). As decisional law of this state and other jurisdictions makes this issue decisive to the instant matter, it is again propounded here for this Court's attention, this time as a separate argument.

I. THE COURT CONSIDERED AN IMPERMISSABLE AND UNCONSITUTIONAL FACTOR IN AGGRAVATION, PRECLUDING IMPOSITION OF THE DEATH PENALTY.

The State does not quarrel with the fact that

the Defendant's confession to the murder of Thomas Griebell was considered as a factor in aggravation at the sentencing hearing. Similarly, the State does not question that Ruiz was never convicted of that crime or that he was not represented by an attorney at the time of the confession. Indeed, the plaintiff's sole response to this argument is that no objection was made when this transcript was introduced and, according to the State, no argument based upon it can be made now (Pl. Br. p. 22).

This assertion is untrue. While defendant doubts that in any event would this Court impose the death penalty merely because a defense attorney failed to say, "I object," where the infirmity complained of is constitutional, as it is here, such objection need not be made to preserve the issue for review.

Initially, under Ill. Rev. Stat., Ch. 110A, Sec. 615(a), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Thus, in People v Graves, 23 Ill. App.3d 762, 320 N.E.2d 95 (1975), the Court allowed a con-

stitutional attack upon the statute under which the defendant was convicted though he had not raised that issue in the trial court. The Court stated:

> "The right not to be convicted of an offense charged under an 'erroneous and void statute is a 'substantial right.'" 23 Ill App.3d at 766.

Similarly the right not to be executed under an unconstitutional application of Ill. Rev. Stat., Ch. 38, Par. 9-1 is a substantial right. Since the state has argued Par. 9-1 (c) allows the sentencing authority to include aggravating factors other than those specifically enumerated, it is hereby submitted that that portion of the statute, to wit:

> "Aggravating factors may include but need not be limited to those factors set forth in Subsection (b)."

is unconstitutional if it allows consideration of a purported offense for which the defendant was never convicted.

This proposition is decisively disposed of by State v McCormick, 397 N.E.2d 276 (Sup. Ct. Ind., 1979).

There, the Supreme Court of Indiana considered the propriety of Ind. Code , Sec. 35-50-2-9 (1979), the State's death penalty statute. Specifically, the defendant challenged the constitutionality of subsection (b) (8), an aggravating factor which stated:

> "The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder."

The defendant attacked both the constitutionality of the statute on its face and as applied to his case.

The Supreme Court agreed that the statute was unconstitutional as applied to the defendant. Indiana, like Illinois, requires proof of death sentence applicability beyond a reasonable doubt. The Court then held that to use the other murder as an aggravating factor would require its proof beyond a reasonable doubt. Since a conviction had not been obtained, and reasonable doubt decided in that manner, the defendant, in essence, would be tried for this unconvicted murder during his sentencing hearing.

The sentencing authority trying that issue, the Court noted, "would be undeniably prejudiced" by the conviction before it of an unrelated murder. (397 N.E.2d at 280). In short, the Court stated:

> ". . . because of the prejudice inherent in the sentencing procedure where the State alleges that the defendant committed another murder, "regardless of whether he has been convicted of that other murder," and that other murder is not related to the principal charge, we hold that Sec. 35-50-2-9 (b) (8) denies due process as applied to this defendant. U.S. Const. Amend. XIV." (397 N.E.2d at 281).

Luis Ruiz has not been found guilty of the murder of Thomas Griebell beyond a reasonable doubt. Its application as an aggravating factor here is plain, unconstitutional error.

As stated in the defendant's initial brief, the misuse of aggravating factors has already been held dispositive by this Court, People v Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980). Indeed, regarding the plaintiff's contention that this argument was waived by the failure to object in the trial court, attention is directed to

the fact that in Brownell, the defendant never raised the argument upon which his sentence was reversed (79 Ill. 2d at 525).

It is impossible for this Court to read the mind of the trial judge to determine what part the Griebell incident played in the decision to sentence this defendant to death. Suffice it to say that the State presented this fact at length and emphasized it for effect. It was unconstitutional for it to have done so and the sentence of death must be vacated.

II. A DEFENDANT FOUND GUILTY OF MURDER BY VIRTUE OF ACCOUNTABILITY CANNOT BE SENTENCED TO DEATH UNDER THE ILLINOIS DEATH PENALTY STATUTE.

To the extent this Court deems it appropriate, the defendant apologizes for what plaintiff calls the two "disjointed" arguments posed in the initial brief. The concepts of the death penalty, intent and accountability of all, has long been subject to confusing and sophisticated legal debate. While defendant believes his cause has been presented in a forthright and coherent manner, the very na-

ture of this cause does not lend itself to simple Kantian logic; for, as stated by Justice Blackmun in a recent oral argument on this issue - - death is different.

The Supreme Court of the United States made that fundamental precept quite clear in Gardner v Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S. Ct. 1197 (1977). There, the Court sought to distinguish the case before it from Williams v New York, 337 U.S. 241 (1949). In so doing, the Court noted:

> "In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was found guilty of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.
>
> First, five members of this Court have now expressly recognized that death is a

> kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (97 Sup. Ct. at 1204; citations omitted).

The very debate which rages within the confines of this case ought chrystallize, in terms of the reasoning above, the inappropriateness of the death penalty here.

The defendant's argument is really rather simple: the intent requisite for proof of guilt for accountability differs from the intent necessary for exposure to the death penalty. The difference is made clear both by the legislature enactment of the death penalty and decisional law on sentencing for accountability.

The State counters by saying that an accountable defendant is equally guilty of the principal crime and that the accountability exclusion for felony-murder necessarily means its inclusion under other aggravating factors. Both arguments are fallacious and ignore the dictate that "death is a different kind of punishment from any other which may be imposed in this country."

While the initial brief is filled with cases revealing that accountable defendants traditionally are sentenced more leniently than principal offenders, the State contends that since they are eligible for the same punishment, this defendant may be sentenced to death. But death is different. Equal guilt does not mean equal punishment. When this has historically been true of lesser offenses, it certainly must be true of capital crimes.

Simply stated, the level of intent differs. Under Ch. 38, Par. 9-1 (f), the State must prove eligibility for the death penalty beyond a reasonable doubt. Under aggravating factor b (3) the State must show, beyond a reasonable doubt, this defendant's intent to kill more than one

person. By the very fact that the State concedes Ruiz did not kill anybody, it fails in its burden.

Any argument that accountability intent, principal crime intent and death penalty intent differ is dispelled by the decision of the Supreme Court of Michigan in People v Aaron, 299 N.W.2d 304 (Sup. Ct. Mich. 1980). In that case, following a fascinating historical study of the felony-murder doctrine, the Court abolished the doctrine in that State.

Quoting from Gegan, "Criminal Homicide in the Revised New York Penal Law." 12 N.Y.L. Forum, 565, 586 (1966), the Court stated:

> "'If one had to choose the most basic principle of the criminal law in general . . . it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. . .'" (299 N.W.2d at 316).

The Court went on to hold:

> "The most fundamental characteristic of the felony-murder rule violates this

> basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons. The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct." (299 N.W.2d at 317; emphasis supplied.)

The doctrine of accountability and its relation to punishment is precisely the same as applied to this defendant as to one found guilty of felony murder. Indeed, the Michigan Supreme Court found it particularly abhorrent in capital cases stating that while other murders required a showing of premeditation, deliberateness and willfulness for imposition of the death penalty, "felony-murder only requires a showing of intent to do the underlying felony." (299 N.W.2d at 317).

It is simply illogical to presume that the legislature removed accountability from death penalty consideration for felony-murder and yet deemed it applicable to other aggravating factors. The intent to commit three murders and

"the intent to promote or facilitate such commission" (Ill. Rev. Stat., Ch. 38, Par. 5-2(c)) are different. Indeed, if the legislature desired, it could have used the words "intent to commit."

The death penalty simply cannot be imposed based upon a concept that "ignores the concept of determination of guilt on the basis of individual misconduct." Neither the legislature, nor the common law of this state ever intended it to be so imposed. The evidence was unrefuted that this defendant refused to participate in the stabbing. His intent and his individual misconduct differed from that of the principal perpetrators.

The plaintiff attempts to invoke mitigating factor (5): "the defendant was not personally present during commission of the act or acts causing death" as a basis for holdthat the legislature intended accountability to apply to the death penalty. However, as hiring one to commit murder makes one eligible for the death penalty, it is this crime which is addressed by this mitigating factor as well as situations where explosive devices are used.

Inspite of the defendant's statement in the initial brief that trial court's "inclusio unis, exclusio alteris" interpretation was a bizarre way to apply the death penalty, the State has again relied on that theory here. As first stated in Furman v Georgia, 408 U.S. 238 (1972), and reiterated in Gregg v Georgia, 428 U.S. 153, 188 (1976), the uniqueness of the death penalty forbids its imposition "under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg further noted that a suitable statute be drafted to ensure "that the sentencing authority is given adequate information and guidance." (428 U.S. at 195). It is simply the defendant's position that adequate sentencing guidance cannot be found for imposition of death where the statute eliminates accountability for felony-murder, includes it for murder for hire and is silent on the other factors. If a presumption must be made as to what the legislature intended, that presumption must be made against death.

III. THE ILLINOIS DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IF APPLIED TO ACCOUNTABILITY CONVICTIONS.

The State's response to this argument is very brief and evasive. It contends that Ill. Rev. Stat., Ch. 38, Par. 9-1 (1979) has been upheld by this Court, a proposition not denied by defendant and that the quote from Lockett v Ohio, 438 U.S. 586 (1979) is from a concurring opinion and not persuasive.

Additionally, and misleadingly, the plaintiff has implicitly stated that Lockett upholds the concept of death penalty imposition for accountability because the Court held the indictment adequately informed of him of his eligibility under the Ohio statute. However, informing the defendant of legislative intent is far from holding that such intent is constitutional.

In fact, Justice Burger, writing for the plurality found one of the statute's infirmities to be that it did not allow lack of intent to commit murder to be an independent, mitigating factor. Moreover, in a second concurring

opinion, Justice Blackman stated:

> ". . . the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her mens rea, in the commission of the homicide." (438 U.S. at 613)

Justice Blackman went on to note that accountability eligibility of the death sentence would most likely lead to the Eighth and Fourteenth Amendment violations found in Furman v Georgia, 408 U.S. 238 (1972). Thus, the various opinions of Supreme Court Justices in Lockett are indeed persuasive. It is, in fact, inconceivable that the Supreme Court of the United States will allow accountability convictions to lead to the electric chair.

The State's response to the argument that accountability application renders the statute vague merely reveals its failure to consider the difference in intent between aiding and abetting and being a principal, the fact that "intent" is made a factor in Par. 9-1 (b) (3) and the con-

cept that the death penalty differs from other punishment. This latter factor includes a close judicial scrutiny of the statute under which the penalty might be invoked.

In Woodson v North Carolina, 428 U.S. 280 (1976), the Supreme Court held that a death penalty statute must allow consideration of the "circumstances of the particular offense" as a "constitutionally indispensable" factor (428 U.S. at 304). In Lockett v Ohio, 438 U.S. 586 (1979), the Court repeated its oft noted dictate that death sentence discretion must be wide in considering mitigating factors. Indeed, after stating that states are free to impose equal guilt on accomplices, the Court stated:

> "But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." (438 U.S. at 602).

The State evidently disagrees with that statement. It would have this Court hold that accountability, having been defined by this State as amounting to equal guilt, "automatically" dictates that death is the proper penalty.

As stated in the previous argument, this submits applicability of the death sentence to a presumption. The statute has eliminated accountability for one factor and embraced it for another. The plaintiff now wants this Court to presume that it automatically applies to the factors which are silent in that regard. Going even further, the plaintiff does not even see it to be considered as a factor in mitigation.

A death penalty statute subject to the State's construction here is unconstitutional on its face, at worst, and unconstitutionally vague at best. Death penalty statutes are required to be definitive. This statute is not in the area of accountability. It cannot stand as a basis for this defendant's execution.

CONCLUSION

Wherefore, for all these reasons, defendant, Luis Ruiz, respectfully prays this Court to vacate the sentence of death. He further prays this Court to reverse his conviction, or, in the alternative, remand this cause for a new trial.

Respectfully submitted,

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